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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 51

DUPUY H. ANDERSON ET AL., APPELLANTS

v.

WADE O. MARTIN, JR.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINION BELOW

The opinion of the United States District Court for the Eastern District of Louisiana (R. 26–36) is reported at 206 F. Supp. 700.

JURISDICTION

The order denying the prayer for a permanent injunction is dated September 28, 1962 (R. 44). Notice of Appeal was filed October 25, 1962 (R. 48), and probable jurisdiction noted on February 18, 1963 (R. 50). Jurisdiction of this Court to review this decision on direct appeal rests on 28 U.S.C. 1253.

QUESTION PRESENTED

Whether Title 18, § 1174.1 of the Louisiana Revised Statutes, which provides that the official ballots in any

primary, general and special election shall state the race of each candidate, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[1]

STATUTE INVOLVED

Section 1174.1 of Title 18 of the Louisiana Revised Statutes of 1950 (Act No. 538 of the 1960 Louisiana Legislature) provides as follows:

> A. Every application for or notification or declaration of candidacy, and every certificate of nomination and every nomination paper filed in any state or local primary, general or special election for any elective office in this state shall show for each candidate named therein, whether such candidate is of the Caucasian race, the Negro race or other specified race.
>
> B. Chairman of party committees, party executive committees, presidents of boards of supervisors of election or any person or persons required by law to certify to the Secretary of State the names of candidates to be placed on the ballots shall cause to be shown in such certification whether each candidate named therein is of the Caucasian race, Negro race or other specified race, which information shall be obtained from the applications for or notifications or declarations of candidacy or from the certificates of nomination or nomination papers, as the case may be.

[1] The United States takes no position on either of the appellants' other contentions: (1) that the statute violates the Fifteenth Amendment, and (2) that the statute violates the First Amendment as it has been made applicable to the States by the Fourteenth Amendment.

C. On the ballots to be used in any state or local primary, general or special election the Secretary of State shall cause to be printed within parentheses ( ) beside the name of each candidate, the race of the candidate, whether Caucasian, Negro, or other specified race, which information shall be obtained from the documents described in Sub-section A or B of this Section. The racial designation on the ballots shall be in print of the same size as the print in the names of the candidates on the ballots.

STATEMENT

Appellants Dupuy H. Anderson and Acie J. Belton are citizens of the United States and of East Baton Rouge Parish, Louisiana. They are Negroes. Each sought election to the School Board of East Baton Rouge Parish in the Democratic Primary Election of July 28, 1962. On June 8, 1962, they filed a complaint in the United States District Court for the Eastern District of Louisiana to enjoin enforcement of Act No. 538 of the 1960 Louisiana Legislature, § 1174.1 of Title 18 of the Louisiana Revised Statutes, which would require appellee, the Secretary of State of Louisiana, to print their race in parentheses beside their names on all ballots to be used in the election (R. 1).

The complaint alleged that the statute violated the First, Fourteenth and Fifteenth Amendments to the United States Constitution, and appellants invoked the court's jurisdiction under sections 1981, 1983 and 1971(a) of Title 42, and sections 1331 and 1343(3) of Title 28 of the United States Code. Appellants

sought an injunction against enforcement of the state statute pursuant to 28 U.S.C. 2281 and also asked for declaratory relief under 28 U.S.C. 2201, 2202, for themselves and on behalf of all Negroes similarly situated. They requested that a three-judge court be convened, as provided in 28 U.S.C. 2284.

On June 11, 1962, a motion for a temporary restraining order was denied by the District Judge with whom the complaint had been filed (R. 15). On June 14, 1962, a three-judge court was designated (R. 17). Argument was heard and the case was submitted to the three-judge court on June 26, 1962 (R. 20).

In its opinion of June 29, 1962, the court, by a two-to-one vote (Circuit Judge Wisdom dissenting), upheld the constitutionality of the statute and denied a temporary injunction. The court held that the Louisiana statute did not violate the Fifteenth Amendment because that Amendment applied only to denial of the right to vote; and that the statute did not violate the Equal Protection Clause of the Fourteenth Amendment because it applied to "all candidates alike" without discrimination.

The Democratic Primary Election took place as scheduled on July 28, 1962. The Louisiana statute was enforced, and the appellants' race was printed beside their names on the ballots. Appellant Anderson was defeated in the July 28 election, and appellant Belton was defeated in the runoff election held on September 1, 1962.

On September 19, 1962, appellants filed a motion for leave to file an amended or supplemental com-

plaint (R. 36). On the same date the motion was denied (R. 43). The amended complaint alleged that the appellants' unsuccessful candidacies were substantially influenced by the enforcement of Act No. 538 and that each of the appellants intended to become candidates in the future (R. 37–42). On September 28, 1962, the court, incorporating the opinion of the three-judge court of June 29, 1962, denied appellants' prayer for a permanent injunction (R. 44). Judge Wisdom again dissented. Notice of appeal was filed on October 25, 1962, and this Court noted probable jurisdiction on February 18, 1963.

INTEREST OF THE UNITED STATES

The United States has a particular interest in the protection of constitutional rights relating to the elective process. In the 1957 and 1960 Civil Rights Acts Congress authorized the Attorney General to institute civil actions to protect voting rights of citizens from discriminatory practices. 42 U.S.C. 1971, as amended. Pursuant to that grant of authority, the United States has filed suit in more than forty counties in five States to enjoin unwarranted distinctions in the right to vote and to prevent threats, intimidation or coercion in connection with the exercise of this right. Legal proceedings have also been instituted by the United States to secure inspection of voting records under 42 U.S.C. 1974b. Finally, the United States has directly attacked the constitutionality of state voter qualification laws in the States of Louisiana and Mississippi.

Nearly all of this activity has been directed at eliminating various forms of state-imposed racial discrimination from the voting process. Such discrimination has generally taken the guise of restrictions upon the rights of Negro citizens to register and to cast a ballot. But other types of state regulation may equally affect the integrity of the elective franchise and may impermissibly inject racial distinctions into the voting process. For the reasons developed in this brief, we believe that this is the necessary consequence of the legislation at issue here.

SUMMARY OF ARGUMENT

The district court held that the appellants were not denied the equal protection of the laws by the Louisiana statute because (1) the races of *all* candidates are designated on the official ballot, and (2) the statute does not produce any "actual discrimination" other than by private individuals "wholly beyond the control of the state." In our view, the statute, by concentrating exclusively on the single factor of the candidate's race, has the necessary consequence of facilitating, encouraging and promoting discrimination by voters against candidates of the Negro race. The equal treatment afforded by the statute is illusory only, since none but a Negro candidate is likely to be injured by the labeling requirement. The State has a heavy burden when it seeks to justify the use of a racial designation. Here, that burden cannot be met, for it cannot be said that a statute which singles out race alone as a fact to be stated on the ballot is genuinely concerned with identifying the candidate or

informing the electorate. It follows that the enforcement of Louisiana's statute denies to candidates of the minority race the equal protection of the State's laws.

ARGUMENT

LOUISIANA'S COMPULSORY RACIAL DESIGNATION OF CANDIDATES ON AN OFFICIAL STATE BALLOT VIOLATES THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION BECAUSE IT ENCOURAGES VOTERS TO DISCRIMINATE ON THE BASIS OF RACE

A. THE STATUTE PROMOTES VOTING DISCRIMINATION AGAINST NEGRO CANDIDATES

In the present case, as in *National Association for the Advancement of Colored People* v. *Alabama*, 357 U.S. 449, 463, "[t]he crucial factor is the interplay of governmental and private action." It is clear that an individual Louisiana citizen is free to cast his vote for whomever he likes. His private choice is unfettered by the Fourteenth Amendment, and it may be determined entirely by racial prejudices. On the other hand, it is equally obvious that the State of Louisiana may not affirmatively bar Negro citizens from holding public office merely on account of their race. Such discrimination by the State, based upon a classification which this Court has declared to be "obviously irrelevant and invidious" (*Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192, 203), would violate the Equal Protection Clause of the Fourteenth Amendment.

This case falls between the two extremes. The State of Louisiana has not, by this statute, directly

imposed any restraint upon a Negro's candidacy, nor has it, by the *self-executing* force of any statute or regulation, reduced a Negro's chances of election. But the statute indirectly, but nonetheless inevitably, discourages Negro citizens from becoming candidates for public office and reduces the probabilities of a Negro's election by compelling all candidates to advertise their race on the ballot.

The contents and form of the official ballot used in general and primary elections in the State of Louisiana are prescribed by statute. La. Rev. Stat. §§ 18:316, 18:671. Before 1960, when the statute here in question was enacted, primary ballots contained no information concerning any of the candidates other than their names. General election ballots also grouped the candidates according to the political parties which they represented. The effect of the 1960 amendment was to add to the ballot a single item of information—the race of each of the candidates. Consequently, Louisiana's primary ballots now contain only the names of the candidates and each one's race. On general election ballots, candidates are grouped according to party affiliation, and racial designations follow their names.

By attaching *only* a racial label to the otherwise unadorned name of each candidate on the official ballot, the State of Louisiana implies to its voting citizenry that the candidate's race is or should be an important element in the voter's choice. By placing the racial designation upon the very document on which the voter expresses his choice, the State directs the voter's

attention to this single consideration at the most critical moment in the entire electoral process—the instant at which the vote is cast. The inevitable effect of this practice is to encourage individual voter-citizens to cast their ballots along racial lines. Since Negroes constitute a distinct racial minority among Louisiana's voters,[2] they are the ones who are injured if the State's emphasis on race succeeds in encouraging voting on racial lines.

By requiring a racial label on the ballot, Louisiana promotes private racial discrimination by voters in the same manner as a State might promote racial segregation by requiring or supplying signs to designate separate Negro and white facilities in privately owned places of public accommodation. In *United States* v. *City of Jackson*, 318 F. 2d 1 (C.A. 5), it was argued that such signs were merely "a helpful hint" and that they "just assist members of both races in the *voluntary* separation of the races." Quoting from its opinion in *Baldwin* v. *Morgan*, 287 F. 2d 750, the Court of Appeals for the Fifth Circuit stated (318 F. 2d at 8):

> It is simply beyond the constitutional competence of the state to command that any facility *either shall be labeled as* or reserved for the exclusive or preferred use of one rather than the other of the races. * * * [Emphasis added.]

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[2] The report of the Commission on Civil Rights states that as of December 31, 1960, there were 992,684 registered white voters in Louisiana and 158,765 Negro voters. In East Baton Rouge Parish, where the appellants ran for office, the figures were 66,041 white voters and 10,573 Negroes. U.S. Comm'n on Civil Rights, *The 50 States Report* (1961) 214–215.

The State's involvement is the same in the case of the State's ballot as it is in the case of the State's sign. Each is ineffective unless a private individual supplements it with private discrimination. But in each instance it is the State which has pointed the way.

The "indirect" restraint which this labeling requirement imposes upon a Negro's candidacy is very much like the consequences which this Court observed would follow from "[a] requirement that adherents of particular religious faiths or political parties wear identifying arm-bands." *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 402. Although an arm-band requirement would not directly stifle speech and would, in fact, impart truthful information concerning the wearer's affiliation, repressive consequences would result from the combination of "state power" and "private action." See *National Association for the Advancement of Colored People* v. *Alabama*, 357 U.S. 449, 463; *Bates* v. *Little Rock*, 361 U.S. 516, 524. Similarly, the labeling provision of the Louisiana statute, when considered in light of "private attitudes and pressures," *ibid.*, has a clearly coercive effect on the candidacy of Negro citizens for public office.

B. THE STATUTE IS NOT SAVED MERELY BECAUSE ITS TERMS APPLY EQUALLY TO ALL CANDIDATES

The district court observed that pursuant to the statute in question "all candidates must state their race and have it printed on the ballot" (R. 32). On this basis, it concluded that the Louisiana statute was "nondiscriminatory," and distinguished the decision of the Tenth Circuit in *McDonald* v. *Key*, 224 F. 2d 608,

certiorari denied, 350 U.S. 895, which had declared unconstitutional a similar labeling provision applicable only to Negro candidates.

The district court's conclusion was erroneous. The guarantee of the Equal Protection Clause of the Fourteenth Amendment is not limited to *express* statutory classifications. As this Court noted in *Griffin* v. *Illinois*, 351 U.S. 12, 17 n. 11, "a law nondiscriminatory on its face may be grossly discriminatory in its operation." *Griffin* v. *Illinois* and many of this Court's decisions regarding the constitutional rights of indigent defendants in the state courts, culminating with *Douglas* v. *California*, 372 U.S. 353, decided last Term, attest to the proposition that the constitutionality of state action under the Equal Protection Clause must be measured by the necessary effect of the State's conduct, and not merely by the language of its law.

In the present case, the equal treatment which the Louisiana statute affords to Negro and Caucasian candidates is illusory only. Obviously, the racial percentages of Louisiana's voting population being what they now are,[3] Caucasian candidates have little to lose if their race is displayed on the official ballot. Negro candidates, on the other hand, are likely to encounter discrimination. Hence, as in *Goss* v. *Board of Education*, 373 U.S. 683, 688, "[t]he alleged equality [is] * * * only superficial." The full extent of the statute's "nondiscriminatory" nature is that Louisiana law now equally compels both Negro and white candidates to suffer at the polls from racial prejudice.

[3] See note 2, p. 9, *supra*.

C. THE STATUTE IS NOT A LEGITIMATE MEANS OF IDENTIFYING CANDIDATES OR OF INFORMING VOTERS

We may assume, for purposes of argument, that if Louisiana could demonstrate a legitimate interest in displaying *only* the race of each of its candidates for public office next to the candidate's name on the official ballot, such a showing might save Act No. 538. See, *e.g.*, *Bates* v. *Little Rock*, *supra*, at 524. However, the burden of justifying a racial designation is a heavy one. And when, as here, the integrity of the electoral process is involved, the burden should be heavier still. We submit that there is no compelling interest to warrant the racial designation required by Louisiana.

There is no substance to the argument that the State was concerned with further identifying the names on the ballot so as to enable voters to relate the names with actual living persons whom they have seen or heard during an election campaign. Although physical description may be one means of making such an identification, the bare racial label is surely inadequate for this purpose. At best, it is a group identification which serves only to classify the person so described as the "white" or "Negro" candidate—precisely the "invidious" distinction which the State may not promote. See p. 7, *supra*.

In some States identifying information other than the names of the candidates appears on the ballot;* Louisiana is the only State which uses a racial label.

* *E.g.*, Gen. Stat. Kansas 1949 (1961 Supp.) § 25-602 (residence); Rev. Stat. Maine 1954, C. 5, § 5 (residence); Ann. Code Maryland, 1957, Art. 33, § 94 (residence); Ann. Laws

Data concerning a candidate's address, his occupation, or the fact of his incumbency is far more helpful in making a specific identification than is a racial designation. Since most candidates are white, the "Caucasian" label has almost no significance whatever. If, as was true here, more than one Negro candidate runs for office, the "Negro" label merely narrows the field. And if physical description is deemed most appropriate, there are surely many more specific physical characteristics which contribute to *individual* identification than the candidate's race. At best, Louisiana might use race as one of several identifying features. Its isolation on the official ballot is susceptible of only one interpretation—a design to encourage voting along racial lines—and cannot be justified by the minimal assistance it lends to the identification of the candidates.

Equally without merit is any claim that the State is interested in informing the electorate of the personal traits of each candidate, so that the voters might have these considerations in mind when they decide whom to select. The bare racial label on the official ballot cannot serve this purpose. It imparts only the sort of information which invites "invidious" discrimination. See p. 7, *supra*. Standing alone, as it does on the Louisiana ballot, it is of no other significant informational value, as it perhaps might be in the context of a detailed biography of the candidate.

Massachusetts (1962 Supp.) C. 54, § 41 (residence and incumbency); New Hampshire Rev. Stat. Ann., 1955, § 59:3 (residence); Vermont Stat. Ann., 1959, Title 17, § 792(b) (residence); West Virginia Code, 1961, § 97 (residence).

Moreover, if Louisiana's purpose were to convey biographical information to its voters so as to enable them to make an educated choice, it could accomplish this objective far more effectively by distributing such a biography well in advance of the actual vote. The damaging effect of the racial label on the ballot is substantially greater than its minimal contribution to the public's last-minute knowledge of the candidates.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the district court should be reversed.

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